

NOV 14 1968
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 76

ELLIOTT ASHTON WELSH, II,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY BRIEF

J. B. TIER
257 S. Spring Street
Los Angeles, California 90012
Attorney for Petitioner

INDEX

I. Welsh's Beliefs Are Within the Intent of the Law	2
A. Welsh's "training" is sufficient	2
B. Welsh's belief is sufficient	2
C. Another constitutional problem arises: The Ninth Amendment	4
II. The Act, As Applied to Welsh, Offends the Constitution	7
A. The government first argues "accommodation"	7
B. The government uses the same argument against Welsh that it used against Seeger	9
III. The Induction Proceedings Require Reversal	10
A. The Facts	10
B. Our argument	12
Conclusion	15

TABLE OF CASES

<i>Briggs v. U. S.</i> , 9 Cir., 1968, 397 F.2d 370	13
<i>Cherneckoff v. U. S.</i> , 9 Cir., 1955, 219 F.2d 721	12, 13
<i>Goguen v. Clifford</i> , 304 F.Supp. 958 (D.N.J. 1963)	4
<i>Griswold v. Connecticut</i> , 381 U.S. 479	7
<i>In re Nissen</i> , 146 F.Supp. 361 (D.Mass. 1956)	2
<i>Koster v. Sharp, et al.</i> , 303 F.Supp. 837 (E.D. Penna., 1968)	4
<i>Oshatz v. U. S.</i> , 9 Cir., 1968, 404 F.2d 9	14
<i>Seeger v. U. S.</i> , 380 U.S. 163 (1965)	2, 3, 4
<i>Selective Draft Law Cases</i> , 245 U.S. 366 (1918) (<i>Arver, et al.</i>)	7, 8, 9
<i>Shacter v. U. S.</i> , Crim No. 28278 (D.Md. Dec 12, 1968)	3, 4
<i>U. S. v. Kauten</i> , 2nd Cir., 1943, 137 F.2d 703	3

INDEX

U. S. ex rel. Phillips v. Downer, 2nd Cir., 1943, 135 F.2d 521 3

U. S. v. Sisson, D. Mass., 297 F.Supp. 902 4

U. S. v. Jakobson, 325 F.2d 409 8

CONSTITUTIONAL PROVISIONS
AND STATUTES

First Amendment 5

Ninth Amendment 9

50 U.S.C. App. § 462 15

OTHER AUTHORITIES

Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?*, American Bar Association Journal, Vol. 53, 1033-39 6

Bertelsman, *The Ninth Amendment and Due Process of Law—Towards a Viable Theory of Unenumerated Rights*, U. of Cincinnati Law Rev., Vol. 37, pp. 785-796 7

Minnesota Law Review 36:1, p. 72 9

14 Papers of Thomas Jefferson 18 (Boyd ed., 1958) 6

Religion and the Law, Aldine, 1962, pp. 37-38, 40-41 8-9

The American Treasury, Ed. Fadiman (1955) 7

The Federalist, No. 84 6

31 Virginia Law Review 40, p. 56 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 76

ELLIOTT ASHTON WELSH, II,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY BRIEF

Three points have been briefed in this case:

- I. Whether Welsh can be considered "religious", within the intent of the conscientious objector provisions of the Act.
- II. Whether the Act, as applied to him, offends the Constitution.
- III. Whether the induction proceedings require reversal.

Welsh's Beliefs Are Within the Intent of the Law.

We have argued that petitioner Welsh is factually and legally in a status similar to the petitioners in *Seeger v. United States*, 380 U.S. 163 (1965).

The Government argues that he has neither the training nor the belief required.

We now add the following:

A. Welsh's "training" is sufficient.

In re Nissen, 146 F.Supp. 361, 363 (D.Mass. 1956):

"... it seems reasonable to conclude that so far as Congress was thinking of training it regarded it as meaning no more than individual experience supporting belief; a mere background against which sincerity could be tested. I confess this is an appealing position, both logically and administratively. If the purpose is to exempt from military service citizens, or would-be-citizens, who have certain religious convictions, the manner in which they attained them is entirely unimportant except insofar as it may assist in ascertaining whether they did."

B. Welsh's belief is sufficient.

There is no basis in the record for concluding that Welsh is an atheist or that his beliefs are legally less "religious" than Seeger's. See Appendix 31, where, in his letter to the local board, he concludes: "I cannot fully account for my decision intellectually". Also, note that dissenting circuit judge (Hamley) concluded, after reviewing the evidence, that there was no basis in fact for the Selective Service System's determination that its registrant Welsh's objections were not of a religious nature. See Appendix 74-81.

We submit that there is a close parallel between the beliefs of Welsh and Seeger, in fact and in light of this Court's *Seeger* opinion.

We invite attention to the following:

Menander, as quoted in *United States v. Kauten*, 2nd Cir., 1943, 137 F.2d 703:

"Conscience is a God to all mortals." (708)

Shacter v. United States, Crim. No. 28278 (D.Md. Dec. 12, 1968):

"The government further notes that defendant told his draft board that he was an atheist. This statement, considered in the context of the records as a whole, would not provide a basis in fact for concluding that defendant's beliefs were not reached by reason of religious training and belief, as that term has been construed by the Supreme Court in *Seeger*. One of the approved meanings of the word atheist is one who does not believe in an orthodox God. But one who does not believe in an orthodox God is not disentitled under the terms of the statute to claim exemption to such classification in spite of his expressed disbelief in the existence of God."

U. S. ex rel. Phillips v. Downer, 2nd Cir., 1943, 135 F.2d 521:

"Hence we said in the *Kauten* case, 133 F.2d at page 708: 'The provisions of the present statute are more generous for they take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption.' And we found religious belief to arise 'from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe,' a belief 'finding expression in a conscience which categorically requires the be-

liever to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."

Seeger v. United States, 380 U.S. at 173:

"No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs."

The question here, in Welsh's case, is between "religious" and what is commonly considered "non-religious" belief.

Although Welsh is not an atheist and we do not have to argue that an atheist (as in *Shacter*, supra) can qualify as a conscientious objector we do believe that a "religious atheist" is not a contradiction in terminology and that such a person could qualify.

C. Another constitutional problem arises: The Ninth Amendment.

The government argues that a qualitative difference exists

"between religious and non-religious objection to war is one which Congress could reasonably recognize in deciding whom to subject to involuntary military service. The Constitution does not set up freedom of conscience, it does not equate conscience with religions." (p. 31).

There are at least two answers to this:

First, there is an ever growing volume of opinion equating conscience and religion:

In addition to *United States v. Sisson*, D.Mass., 297 F.Supp. 902, two other courts have held identically: *Koster v. Sharp, et al.*, 303 F.Supp. 837 (E.D. Penna., 1968) and *Goguen v. Clifford*, 304 F.Supp. 958 (D.N.J. 1963);

"The practical effect of *Koster and Sisson*, with which this Court is in accord, is to leave as the sole test for discharge, on the basis of conscientious objection, that of sincerity of one's conviction that war is wrong. Since the sincerity of petitioner is unquestioned, his request for a writ of habeas corpus shall be granted."

Next, this argument of the government brings the Ninth Amendment into the picture: that conscience is an area reserved to the individual and that it may not be invaded by Congress. To bring this into sharper focus we repeat the government rationale:

Arguing that there are no Constitutional limitations in the attempt by Congress to distinguish between religious and non-religious objections to war, the Government asserts that, "The Constitution does not set up freedom of conscience, it does not equate conscience with religion. Nor was Congress bound to do so. Congress could reasonably draw the line as to who shall and who shall not be compelled to serve by taking into account, as the Constitution does, the right to exercise one's religion freely". [page 31]. Thus, the Government urges the rejection of the formulation which equates the free exercise of conscience with the free exercise of religion, implying that free exercise of conscience is not entitled to equal Congressional concern. While our arguments above implicitly accept the formulation that free exercise of conscience is protected by the First Amendment, we will show that the bifurcation of the rights of free exercise of religion and free exercise of conscience does not lead to the conclusion that freedom of conscience is not constitutionally protected. The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". It would appear that this amendment precisely anticipates

and contradicts the Government's contention that freedom of conscience is not a Constitutionally protected right because, "[the Constitution] does not equate conscience with religion". That the authors of the Constitution were aware of the danger inherent in enumerating certain rights is shown by their concern over the adoption of the Bill of Rights. On this subject in *The Federalist* No. 84, Hamilton, urging the adoption of the Constitution without a bill of rights, said:

"Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations.

"WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound better in a treatise of ethics than in a constitution of government." (Emphasis in original).

Madison, who wrote the original draft of the Ninth Amendment,¹ wrote on the same subject in a letter to Jefferson in October, 1788:

"... there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely to be by an assumed power."² (Emphasis supplied).

1. See Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?*, American Bar Association Journal, Vol. 53, 1033-39.

2. 14 PAPERS OF THOMAS JEFFERSON 18 (Boyd ed. 1958). Quoted also in Abrams (footnote 1) p. 1035.

And from a speech by Samuel Adams:

"Driven from every other corner of the earth, freedom of thought and the right of private judgment in matters of conscience direct their course to this happy country as their last resort."³

We would anticipate objections concerning the problems of defining unenumerated rights⁴ by conceding that such rights ought to be of a fundamental nature. In short, we would

"... agree that, in order to prevent judicial abuse, any formula for unenumerated rights must emphasize that the power of the courts to enforce such rights is to be exercised only in exceptional circumstances. Also the criteria for such rights should make as wide a claim as possible to universal acceptance, and be derived from the history and traditions of our people, and, so far as possible, of all peoples."⁵

Thus we contend that the right of free exercise of conscience is given constitutional protection equivalent to the protection granted the right of free exercise of religion and that Congress may not prefer one over the other. cf. *Griswold v. Connecticut*, 381 U.S. 479.

II

The Act, As Applied to Welsh Offends the Constitution.

A. The government first argues "accommodation".

The government brief is based on a theory of accommodation and its argument starts with, and is largely dependent upon the constitutionality of the 1917 Draft Law,

3. Samuel Adams, Philadelphia, 1776. From *The American Treasury*, Ed. Fadiman (1955).

4. See Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, U. of Cincinnati Law Rev., Vol. 37, pp. 785-796.

5. Ibid. 787 (footnote omitted).

as upheld in the Selective Draft Law Cases, 245 U.S. 366 (1918), also known as *Arver, et al.*

The *Arver* decision has been heavily criticized:

1. The Second Circuit in *U. S. v. Jakobson*, 325 F.2d 409, said: "The constitutionality of this provision under the First Amendment was upheld, rather summarily, in *Arver v. United States*, 245 U.S. 366, 389-90 (1918)."
2. Professor Philip B. Kurland, in *Religion and the Law*, Aldine, 1962.

"Mr. Justice White's opinion for a unanimous Court, rendered during the height of the American participation in World War I disposed of the issue quickly, but without authority or reason. 'And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.'⁹⁰ The decision is as sound as reasons given for it." [37-38].

* * *

"Were it not for the Selective Draft cases [*Arver, supra*] it should be clear that exemption from military obligations in terms of religious affiliation is unconstitutional. If military service be considered a duty of every qualified citizen, exemption grants a benefit to religious adherents because they are religious adherents, a result banned by the separation clause. There should be little doubt, for example, that the Government could not refuse commissions in the military service to all members of specified religious sects. It can no more grant benefits on that ground than it can deny them, unless the wall of separation is again to be breached.

Cardozo's reference to *Davis v. Beason*¹¹⁰ suggested that the high wall was to be maintained." [40-41]

3. Harrop A. Freeman, Professor Law at Cornell University writing in 31 *Virginia Law Review* 40, at page 56 says—

"There are some who find in the court's opinion the attitude which Shakespeare made famous in the words: 'The lady doth protest too much, methinks.' For the court's argument is constantly advanced by this type of wording: 'cannot conceive', 'too frivolous for further notice', 'so devoid of foundation', 'not even a shadow of ground', 'to do more than state the proposition is absolutely unnecessary', 'unnecessary to follow', 'wholly unnecessary to explore', 'cannot be the slightest doubt', it is indisputable', 'fallacy of the argument', etc."

4. *Minnesota Law Review* 36:1

"The Selective Draft Law Cases decided, in a single cursory sentence,⁶⁴ that the 'well-recognized sect' provision of the World War I act was not an establishment of religion." [72]

B. The government uses the same argument against Welsh that it used against Seeger. See Supplement to Brief for United States, pages 2A and 3A:

"The essence of the statutory standard lies in the contrast between duties resulting from man's relationship to his fellow men and superior obligations owed to a God or ideal fairly characterized as divine.³

However broadly the words of Section 6 (j) are construed respondent Seeger does not qualify for the

64. 245 U.S. 366, 389 (1917): "And we pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more."

statutory exemption. His views are 'a purely ethical creed.' He based his refusal to participate in military training entirely upon his judgment concerning the effect war has upon men and human affairs (R. 73). He derives his opposition to war, sincere as his conviction may be, not from religious teaching but from essentially political, sociological, or philosophical views. He is not responding to an obligation superior, in his conscience, to all human obligations; he is obeying a personal moral code based, according to his own statement, upon 'how he feels towards his fellow man.'"

Since Seeger does not qualify for the statutory exemption, he is forced to attack its constitutionality and argue that since the government chose to exempt those whose opposition to war is based upon belief in a duty rising above all human obligations, the government must also exempt those whose conscientious opposition is based upon ethical convictions derived from political, social, or moral philosophy, or some combination of the three."

III

The Induction Proceedings Require Reversal.

The Brief for Respondent argues that petitioner *refused* to accomplish the Security Questionnaire form and therefore cannot raise this point.

The Brief for Petitioner had argued that the governing regulations required that "A registrant who qualifies or refuses to accomplish DD Form 98 in its entirety . . . will not be inducted into the Armed Forces pending thorough investigation." [our page 26].

A. THE FACTS

The facts are (1) not that he refused but that he showed he could not sign it ~~in~~ its offered form and that he raised and expressed a question about it, and (2) that there was no "thorough investigation."

His testimony was reasonably clear on this (and no rebuttal was offered, or cross-examination made): "We weren't given time to read the forms. We came to a form that I didn't sign, couldn't sign, because he's asking me to sign—they were asking me to sign something I didn't feel I could sign and I raised my hand to indicate that I had a question about this form, and the gentleman who asked me what was the matter, and I told him that I couldn't sign the form because there's some things that had changed.

And he said to me, "Well, are you going to refuse induction," and I said "Yes."

And he said, "Well, do you want to be a fucking murderer about it." and I said, "No." And then he said, "Well, stand over in the next room and wait." [Appendix 52-53].

We take petitioner's conduct to mean one thing certainly: He wanted to *raise a question* about the form.

The personnel he encountered, at that point, seemed more concerned with the end result than with the requirements of the governing regulation, as the above dialog shows.

The opinion of the Court of Appeals shows this too:

"The investigative process is detailed in AR 604-10, § III, para. 18 (1959); 604-10, §§ IV, V (1959). Rather than delay appellant's induction pending investigation, induction station personnel ordered him to step forward. Appellant now contends that this procedural irregularity vitiates the command to step forward and, therefore, his conviction. We cannot agree." [Appendix 66].

B. OUR ARGUMENT

We argue from the above.

(1) His conduct, with respect to the Security Questionnaire, differs from his conduct when he was offered the induction ceremony. At the latter juncture he gave a flat refusal. His conduct at the security questionnaire juncture certainly was not a flat refusal. At the most it was a qualified refusal.

(2) His question concerning the form, his qualified refusal, deserved an answer or, as is true of the induction ceremony, at least a second opportunity.

(3) We do not claim that the governing regulation on security clearance explicitly recites that two opportunities are to be given. We do claim that the spirit of the regulation implies it as well as explicitly requiring a "thorough investigation." Also that fair dealing and precedent, with respect to the analogous (and immediately following) routine of induction, lends support to our interpretation, as we next argue.

As we pointed out in our Brief for Petitioner [p. 23] army regulations govern the proceedings at the induction station (now termed the Entrance Station), citing *Chernekoff v. United States*, 9 Cir., 1955, 219 F.2d 721, n. 12.

The holding in *Chernekoff* was that a repetition of the induction ceremony was to be given a "refuser" despite the selectee's flat refusal. Two dozen reported opinions refer to *Chernekoff*, but none of them refuses to follow its rationale:

"In the present case the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless to apply the Special Regulation to the appellant as he had

said he would not if asked to so do step forward and become inducted into the Armed Forces. It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words. In *Corrigan v. Secretary of Army*, 9 Cir., 1954, 211 F.2d 293, the court stated it is highly important that the moment a selectee becomes subject to military authority be marked with certainty. It is also important that the moment he becomes liable for civil prosecution be marked with certainty." [725]

(4) After *Chernekov* two other decisions of this same appellate court have a bearing on the principle involved in our case at bar. In *Briggs v. United States*, 9 Cir., 1968, 397 F.2d 370 the unanimous court held:

"Not all procedural irregularities vitiate an order to step forward for induction. Prejudice to the registrant from failure to observe regulations must be established."

(Citing a string of cases)

"The cases cited involve disregard of regulations by selective service system personnel. The disregard of regulations in this case was by military personnel. But no reason appears why the same rule should not apply, although the immediate effect in this case is to vitiate the order to step forward rather than the order to report for induction. Army Regulations, like selective service regulations, constitute part of the procedural framework governing induction. See *Mason v. United States*, supra [373].

Counsel have not cited, and we have not found, any cases which determine whether denial of a physical inspection is sufficiently prejudicial to vitiate the induction process.³

An analogy drawn from exhaustion of administrative remedies cases indicates that the denial of a

physical inspection should be held prejudicial. In *Falbo v. United States*, 320 U.S. 549, 64 S.Ct. 346, 88 L.Ed. 305 (1944) the registrant appealed his conviction for failing to report for work of national importance. The Supreme Court held that he could not challenge his classification because he had not reported for work (and then refused to begin). The court indicated that if he had reported for work he might have been medically rejected."

* * *

"This same factor, the possibility of rejection and reclassification indicates that denial of a physical inspection to appellants was prejudicial. In the exhaustion of administrative remedies cases, this possibility is deemed sufficiently important to justify refusal to consider a registrant's claims of error. It appears reasonable that this possibility be deemed equally important when the military disregards the requirements of a physical inspection.

[3] We could assume that the likelihood of rejection in appellant's case was slight. The physical inspection is relatively cursory, and appellant had recently passed a more rigorous examination." [374].

In *Oshatz v. United States*, 9 Cir., 1968, 404 F.2d 9, the unanimous court held:

"Oshatz' next contention concerns the induction proceedings. He states and the government concedes that the 'loyalty' portion of the induction proceedings was not conducted in conformity with the regulations [11].

* * *

A myriad of regulations specify the procedural steps which must be followed by a registrant, the local board, the appeal board, and military personnel in order to accomplish the induction of a young man into the armed forces, or his exclusion therefrom. Because

there are so many regulations, which are often complex, and because the individuals who are expected to comply with the regulations are not legal experts, procedural irregularities are frequent. Even the most casual glance at the case law will reveal a staggering array of deviations from the regulations which have been advanced as defenses to prosecutions for refusal to submit to induction. The defenses have been unsuccessful where the procedural irregularities are minor and the registrant has not been prejudiced because of them [12].

* * *

In this case Oshatz might not stand convicted of a felony had he been given the opportunity to execute the loyalty questionnaire.⁴ Under the rationale of our decision in *Briggs v. United States*, 307 F.2d 370 (9th Cir. 1968), that is sufficient prejudice to require reversal." [12].

(5) Finally, the governing statute, the Universal Military Training and Service Act of 1951, as amended (50 U.S.C. App. § 462) has language that should apply to all procedures connected with its operation: "... a system which is fair and just."

By reason of the above we claim that petitioner should have been given a second opportunity to accomplish the security questionnaire.

CONCLUSION

We believe the constitutional point need not be reached, but if so then the Act, as applied to Welsh, should be declared unconstitutional.

Respectfully,

J. B. TIETZ

Attorney for Petitioner

January 15, 1970.